TAY SECK LOONG & ORS

v.

TEH CHOR CHEN & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-428 OF 1999]
3 AUGUST 2005

SUCCESSION: *Will - Construction - Date of distribution, determination of - Purport and effect - Whether for benefit of grandsons living at time of distribution - Lapsed gifts - Whether to fall into residuary estate of the will - Whether caught by partial intestacy of testatrix - Rules of the High Court 1980 O. 80 r. 2(2)(a) & (b) - Wills Act 1959 s. 19 - Distribution Act 1958 s. 8*

The case herein turned on the true and proper construction to be accorded to a will executed by the testatrix in 1934. *Inter alia*, the will provided that: (i) the date of distribution of the testatrix's immovable properties was to be the date when the testatrix's youngest great grandson living at the date of her death (in 1939) attained the age of 21 (cl. 4); and (ii) the trustees, after the distribution, must sell and convert the residuary estate into money and divide the same into five equal parts, namely one part to a school in Hokkien District in China and the rest to her four sons "between such of them as shall be living at the date of the distribution" (cl. 6). The evidence showed that the youngest great grandson living at the time of the testatrix's death was Tay Kay Chen, who was born on 16 August 1938 and attained the age of 21 on 16 August 1959. Hence, the date of distribution was 16 August 1959. The facts further showed that the gifts to the school in China, as well as to the sons, had lapsed because the school did not exist and the sons had all died before the date of distribution. Before the learned judge, the plaintiffs, the trustees of the will, submitted that the lapsed gifts had formed part of the residuary estate and could not devolve under a partial intestacy. They further submitted that the grandsons who had been adopted by the testatrix, legally or otherwise, ought to be excluded from the will. The issues were: (i) whether the three lapsed gifts fell into the residuary estate for the benefit of the grandsons living as at the date of distribution or into the partial intestacy of the testatrix; and (ii) whether such 'grandsons' would include all grandsons legally adopted or otherwise.

Held:

[1] Clause 4 of the will reflects the intention of the testatrix to devise and bequest all the movable and immovable property to her trustees to manage the same until the date of distribution, and by cl. 6, the trustees, after the date of distribution, were to sell, call in and convert all the residuary estate into money and divide the clear moneys arising therefrom and all accumulations and any other moneys forming part of the estate into five equal parts. (p. 693 c-e)

[2] Cases of partial intestacy would only arise under s. 8 of the Distribution Act 1958. The section regulates cases of partial intestacy in which a testator has made a will wherein only a part of his property is to be disposed of thereunder. The agreed facts herein however showed that the testatrix has, *vide* clause 4, devised and bequeathed all her movable and immovable properties to her trustees. That being so, no question of partial intestacy could arise within the ambit and purview of s. 8. (p. 693 f-i)

[3] The legal effect of s. 19 of the Wills Act 1959 is that a lapsed gift must be included in and form part of the residuary devise or bequest, if any, contained in the will. Applying s. 19, and the judgment in *Re Chin Sem Lin's Settlement Yong Tet Foong & Anor v. Chin Thin Lee & Ors*, the three lapsed gifts must fall into the residuary estate of the testatrix for the benefit of all grandsons living at the date of distribution to be distributed in accordance with the terms of the will. (p. 695 a-d)

[4] There is no plausible ground advanced by the plaintiffs that could lead the court to exclude any grandson at all. In the circumstances, the court would hold that all grandsons having the family name or surname in the Chinese character Tay, Tey or Teh are within the meaning of the word "grandson" in the will of the testatrix and shall benefit in accordance with the terms thereof. (p. 695 g-h)

[Order accordingly.]

Case(s) referred to:

Hsu Yik Chai v. Hsu Yaw Tang & Anor [1982] 2 MLJ 227 ***(refd)***

Multi-Purpose Holdings Berhad & Yayasan Chang Ming Thien v. General Holdings Sdn Bhd [2003] 2 AMR 669 CA ***(refd)***

Perrin v. Morgan [1943] AC 399 ***(refd)***

Re Chin Sem Lin's Settlement Yong Tet Foong & Anor v. Chin Thin Lee & Ors [1971] 2 MLJ 15 ***(refd)***

Re Harrison [1885] 30 Ch D 390 ***(refd)***

Re Tan Lian Boh, Deceased; Wee Sin Choe & Anor v. The Official Assignee & The Attorney-General [1951] MLJ 187 HC ***(refd)***
Re The Estate of James Montague Bent Vermont, Deceased [1934] MLJ 159 HC ***(refd)***
Re Turner. Carpenter v Staveley [1949] Ch D 935 ***(refd)***
Smidmore v. Smidmore [1905] 3 CLR 344 ***(refd)***
William Tan Sam Kit v. Ngui Ban Lee & Anor [2000] 1 MLJ 574 ***(refd)***

Legislation referred to:
Distribution Act 1958, s. 8
Probate and Administration Act 1959, s. 12
Rules of the High Court 1980, O. 80 r. 2(2)(a), (b)
Wills Act 1959, s. 19

For the plaintiffs - FH D'Cruz (Mogan Karupiah); M/s Mogan Karupiah
For the 1st defendant - Karen Cheah; M/s Fatima Tan & Cheah
For the 25th and 26th defendants - KP Ng; M/s KP Ng & Amardas

Reported by Rose Aziz

JUDGMENT

Low Hop Bing J:

Application

This is an application by way of originating summons in encl. (1) filed by the plaintiffs as trustees of the will dated 16 July 1934 ("the will") of one Lim Kim Neo (F) ("the testratix") for a true construction of the will, under O. 80 r. 2(2)(a) and (b) of the Rules of the High Court 1980.

The plaintiffs also seek the following reliefs:

1. That the second defendant be appointed to represent all or any person or class who is and may hereafter be interested in or affected by these proceedings;

2. That the trusts of the testatrix be carried into effect, and, if and so far as is necessary, administration of the trusts of the will; and

3. Costs.

Agreed Facts

All parties have agreed to the following facts:

The testatrix died on 2 April 1939, having executed the will.

Probate to the will was granted to the four original executors and trustees under the will by the High Court of the Straits Settlement of Malacca on 2 September 1939. The grant of probate was issued on 26 January 1940.

Tay Ek Seng @ Tey Aik Seng, the last of the original four executors and trustees of the will, died on 23 April 1958, leaving his last will dated 30 November 1955.

Since the last executor died testate, his executors under his will became the executors and trustees of the will, there being no break in the chain of representation: s. 12 of the Probate and Administration Act 1959 ("s. 12").

On 30 October 1959, probate to the will of Tay Ek Seng @ Tey Aik Seng was granted to (i) Tay Say Geok (ii) Tay Say Keng and (iii) Tay Seck Huan, three of the executors and trustees of Tay Ek Seng @ Tey Aik Seng, leaving power to the fourth executor and trustee Tay Seck Loong to apply for double probate.

On 8 August 1969, all immovable properties of the testatrix were transmitted to the four trustees of Tay Ek Seng @ Tey Aik Seng. These four trustees also became trustees of the testatrix under s. 12.

Three of the original four trustees, Tay Say Geok, Tay Seck Huan and Tay Say Keng died in 1977, 1984 and 1998 respectively.

By order of court dated 1 March 1999, second, third and fourth plaintiffs were appointed as additional trustees of the testatrix.

Under cl. 4, the date of distribution was to be the date when the testatrix's youngest great grandson living at the date of her death attained the age of 21.

Tay Kay Chen was the youngest great grandson living at the date of her death.

Tay Kay Chen was born on 16 August 1938 and attained the age of 21 on 16 August 1959. Therefore the date of distribution was 16 August 1959 ("the date of distribution").

By cl. 6, the testatrix directed her trustees, after the date of distribution, to sell, call in and convert "... my residuary Estate into money ...", and divide the residuary Estate into five equal parts *viz*:

1. One-fifth to the Trustees of Choo Swee Hian School of Eng Choon district, Hokkien Province in China.
2. The remaining four equal parts, ie, one-fifth each, to her four sons "... between such of them ... as shall be living at the date of the distribution".

The testatrix had four sons namely:

(i) Teh Aik Yee	-	died on 31 March 1949
(ii) Teh Aik Lock	-	died on 1 August 1957
(iii) Teh Aik Whye	-	died on 25 May 1917
(iv) Tay Ek Seng @ Tey Aik Seng	-	died on 23 April 1958

All the four sons of the testatrix died before the date of distribution.

A list of the sons and grandsons of the testatrix who died before the date of distribution appears at pp. 100 to 103 of exh. A, encl. 2. A list of the grandsons of the testatrix living at the date of distribution, but since deceased, appears at p. 104 of exh. A, encl. 2. A list of the surviving grandsons of the testatrix appears at p. 105 of exh. A, encl. 2.

The gift to the school in China had lapsed because the school did not exist at the date of distribution. The two gifts to the testatrix's two sons *viz.* Teh Aik Yee and Teh Aik Lock have also lapsed. All these lapsed gifts are collectively referred to as "the three lapsed gifts".

Agreed Questions For Determination

The parties have agreed that the questions for determination by the court are as follows:

1. Whether the three lapsed gifts fall into the residuary estate for the benefit of the grandsons living as at the date of distribution or fall into the partial intestacy of the testatrix ("Question 1")?

2. Whether such "grandsons" would include all grandsons legally adopted or otherwise (Question 2")?

Principles Of Construing A Will

At this juncture, I find it instructive to restate the relevant principles governing the construction of a will as follows:

1. The duty of the court in construing a will is to ascertain if possible what the testator meant, without preconceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will: per Chang Min Tat J (later FJ) in *Re Chin Sem Lin's Settlement Yong Tet Foong & Anor. v. Chin Thin Lee & Ors* [1971] 2 MLJ 152, 154 E-F left column, referring to a paragraph in *Smidmore v. Smidmore* [1905] 3 CLR 344, 354;

2. The object of interpreting a will is to give effect to the intention of the testator that is expressed in the words of the will and such words are to be read in the light of the circumstances in which the will was made (*Hsu Yik Chai v. Hsu Yaw Tang & Anor.* [1982] 2 MLJ 227 at p. 230 (FC) per Lee Hun Hoe CJ (Borneo) (as he then was);

3. A will should be so construed as to give effect to the intention of the testator, to be gathered from the language of the will read in the light of the circumstances in which the will was made, and the court is entitled to sit in the testator's armchair, but not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said: per Lord Romer in *Perrin v. Morgan* [1943] AC 399 at p. 420; and

4. When a testator has executed a will in solemn form, it must be assumed that he did not intend to make it a solemn farce, and that he did not intend to die intestate when he has gone through the form of making a will and the will ought, if possible, to be read so as to lead to a testacy, not an intestacy: per Lord Esher, MR in *Re Harrison* [1885] 30 Ch. D. 390, 393, was applied by Danckwerts J. in *Re Turner Carpenter v Staveley* [1949] Ch. D. 935; and Ian Chin J. in *William Tan Sam Kit (As the Executor and Trustee of the Estate of the late Tan Sri Datuk William Tan Ho Choon) v. Ngui Ban Lee & Anor* [2000] 1 MLJ 574 at p. 581 B-D.

Question 1: Three Lapsed Gifts

Learned counsel for the plaintiffs Mr. F.H. D'Cruz assisted by Mr. Mogan Karupiah submitted that the three lapsed gifts had formed part of the residuary estate to be distributed according to the will and could not devolve under a partial intestacy. References were made to *Multi-Purpose Holdings Berhad & Yayasan Chang Ming Thien v. General Holdings Sdn Bhd* [2003] 2 AMR 669 CA; *Re Tan Lian Boh, Deceased; Wee Sin Choe & Anor v. The Official Assignee & The Attorney-General* [1951] MLJ 187 HC; *Re Chin Sem Lin's Settlement, supra*; s. 19 of the Wills Act 1959; and in *Re The Estate of James Montague Bent Vermont, Deceased* [1934] MLJ 159 HC.

For the first and the 16th defendants, it was submitted by learned counsel Miss Karen Cheah that under cls. 4 and 6, the three lapsed gifts are subject to distribution under partial intestacy rules.

Mr. K.P. Ng learned counsel for the 25th and 26th defendants supported Miss Cheah's submission and added that the three lapsed gifts cannot fall into the residuary estate in the will.

In my judgment, the clauses which fall to be construed are cls. 4, 5 and 6 which where relevant merit reproduction as follows:

Clause 4: I devise and bequeath all my movable and immovable property whatsoever and wheresoever situate (including any property over which I may have any general power of appointment by Will) (hereinafter called "my residuary estate") to my Trustees subject to the payment thereout of my debts funeral and testamentary expenses and death duties Upon Trust to manage the same until the youngest of my great grandsons who shall be living at my death shall attain the age of twenty one years (hereinafter called "the date of distribution") and I declare that in the meantime my Trustees shall in relation to my immovable property have all such powers of management as are conferred on trustees by Section 41 of Ordinance No. 36 (Conveyancing and Law of Property).

Clause 5 : I direct that until the date of distribution my Trustees shall stand possessed of the nett income of my residuary estate upon the trusts and subject to the powers and provisions following that is to say:

(a) ... .

(b) 1. To pay to each and every "Choo-kwah" (or widow of any male descendant of mine) so long as she remains a widow the sum of Ringgit Malaysia Sixty (RM60/-) per annum in equal monthly instalments.

2. To pay to each and every fatherless child being a descendant of mine until he or she reaches the age of sixteen years the sum of Ringgit Malaysia Sixty (RM60/-) per annum in equal monthly instalments;

(c) As to the balance thereof my Trustees shall be at liberty in their absolute discretion to apply the same or any part thereof for both or either of the following purposes:

1. To provide such sum or sums by way of education as my Trustees shall from time to time think fit for all or any of my great grandchildren who are or become fatherless.

2. ...

Clause 6: From and after the date of distribution I direct my Trustees to sell call in and convert my residuary estate into money and to divide the clear moneys arising therefrom and all accumulations of income and any other moneys forming part of my estate into five equal parts and to pay one of such equal fifth parts to the Trustees for the time being

> of the Choo Swee Hian School in Twa-oo Villafe (sic) Engchoon China and as to the remaining four equal fifth parts thereof to pay and divide the same equally between such of them my said four sons Teh Aik Yee, Teh Aik Lock, Teh Aik Whye and Teh Aik Seng as shall be living at the date of distribution.
>
> Provided always that if any of such sons shall have died before the date of distribution leaving a male child or children living at the date of distribution such male child or children shall stand in the place of such deceased son and take per stirpes between them if more than one of the share of my residuary estate which such son would have taken had he survived the date of distribution.

From the language used in these three clauses, I am of the view that cl. 4 reflects the intention of the testatrix to devise and bequest all her movable and immovable property to her trustees, and after the payment thereout of her debts, funeral and testamentary expenses and death duties, upon trust to manage the same until the date of distribution.

Pursuant to cl. 5, until the date of distribution, the trustees shall stand possessed of the nett income of the testatrix's residuary estate upon trust.

From and after the date of distribution under cl. 6, the trustees were directed to sell, call in and convert all the residuary estate into money and divide the clear moneys arising therefrom and all accumulations and any other moneys forming part of the estate, into five equal parts.

In relation to the issue of partial intestacy, as submitted for the aforesaid defendants, I am of the view that cases of partial intestacy would only arise under s. 8 of the Distribution Act 1958 ("s. 8") which, where relevant, provides that where any person dies leaving a will beneficially disposing of part of his property, the provisions of the Distribution Act 1958 shall have effect as respects the part of his property not so disposed of, subject to the provisions contained in the will. Hence, s. 8 regulates cases of partial intestacy in which a testator has made a will wherein only a part of his property is to be disposed of under his will, while the other part is not included in his will, as a result of which, only the part included in the will shall be dealt with by way of testamentary disposition.

The agreed facts show that the testatrix has *vide* cl. 4 devised and bequeathed all her movable and immovable properties to her trustees. That being the case, the will has brought about a complete testamentary disposition. There is no question of a partial intestacy coming within the ambit and purview of s. 8.

Next, my consideration of some of the authorities cited for the plaintiffs leads me to the conclusion that they have no nexus with the construction of a will pertaining to lapsed gifts.

By way of illustration, the facts in *Multi-Purpose Holdings Berhad*, *supra,* revolve around the setting up of a charitable foundation. Before the judge of first instance, the central issue for determination was whether the respondent, General Holdings Sdn Bhd, was entitled to vary or amend the terms of the supplementary agreement which set up the charitable foundation. The learned Judge gave the answer in the affirmative. In the Court of Appeal, the issues for determination concern the declaration of a trust and not the construction of a will.

In *Re Tan Lian Boh, decd, supra*, the testator's will directed that after his death, his second wife Khoo shall be paid as soon as possible a sum of RM25 only and henceforth be severed from all connections or concerns and be disallowed to interfere with his house properties. There was an intestacy in respect of his residuary estate. The question was whether the testator's will precluded Khoo from sharing the deceased's residuary estate on an intestacy. Brown J. of the Singapore High Court gave an affirmative answer. The learned Judge was however not asked to address the question of a lapsed gift in a will.

In *Re Estate of James Montague, supra*, eight questions on the construction of a will were raised for determination by Whitley J. Upon a careful reading of the judgment, I am unable to identify any issue pertaining to the effect or implication of any lapsed gift in a will.

In my view, these three authorities are not relevant to my consideration of Question 1.

Reverting to the above agreed facts, in particular the lapsed gifts *viz*. gifts which fail or are otherwise incapable of taking effect, I shall now consider s. 19 of the Wills Act 1959 ("s. 19") on which the respective learned counsel have relied. The relevant portion of s. 19 reads:

> 19. Residuary devises or bequests shall include estates comprised in lapsed and void devises or bequests.
>
> Unless a contrary intention appears by the will, such property as is comprised or intended to be comprised in any devise or bequest in such will contained, which fails or is ... otherwise incapable of taking effect, shall be included in the residuary devise or bequest respectively, if any, contained in the will.

In my view, the legal effect of s. 19 is that a lapsed gift must be included in and form part of the residuary devise or bequest, if any, contained in the will.

An illuminating authority is to be found in *Re Chin Sem Lin's Settlement, supra*, where the relevant issue was whether the provision of 40% of the trust property in a deed of settlement fails by reason of impossibility of performance or failure of object. Clause 13 of the deceased's deed of settlement provided for the 40% to be paid to Ken Huin Kongsi in Moyang or Swatow in China for the ancestral graveyard, but no members of the settlor's family resided in China in order to maintain the graveyard. Chang Min Tat J (later FJ) held that the 40% had failed as no one had been able to advise that the graveyard was being maintained. Hence, this portion fell into the residuary estate of the settlor to be distributed in accordance with the terms of the will.

Applying s. 19 and the judgment in *Re Chin Sem Lin's Settlement, supra*, I hold that the three lapsed gifts fall into the residuary estate of the testatrix for the benefit of all the grandsons living at the date of distribution to be distributed in accordance with the terms of the will.

Question 2: Meaning Of Grandson

It was submitted for the plaintiffs that grandsons adopted legally or otherwise are not to be included in the will, while Miss Cheah who acted as *amicus curiae* on this issue said that there is no question of any adoption of any grandson arising in relation to the construction of the will.

In my judgment, this Question pre-supposes that the testatrix had grandsons who were adopted legally or otherwise.

After examining the agreed facts and the genealogical table annexed to the plaintiff's affidavit in support herein from pp. 93 to 105, it is to be noted that in so far as is relevant to this Question, the testatrix had no grandsons who were adopted, legally or otherwise, as all the grandsons were natural issues.

The only person who was alleged to be an adopted grandson was one Tay Say Yin, the son of Teh Aik Whye who was the third son of the testatrix. However, it is to be noted that there is no evidence whatsoever, whether by way of affidavit or *viva voce* testimony to prove the plaintiffs' allegation that the said Tay Say Yin was an adopted grandson of the testatrix. It is not disputed that this grandson is from the family with the Chinese character which is spelt as Tay, Tey or Teh and it was to this Tay, Tey or Teh family that the testatrix had been married. Having regard to all the affidavits and exhibits filed herein, I am constrained to hold that the plaintiffs' allegation cannot be sustained.

For the purposes of the true construction of the will, there is no plausible ground advanced by the plaintiffs in order to lead me to exclude any grandson at all. That being the case, I hold that all grandsons having the family name or surname in the Chinese character of Tay, Tey or Teh are within the meaning of the word "grandson" in the will of the testatrix and shall benefit in accordance with the terms thereof.

Conclusion

The answer to Question 1 is that the three lapsed gifts fall into the residuary estate for the benefit of all the grandsons living as at the date of distribution, to be distributed in accordance with the terms of the will.

The answer to Question 2 is that all grandsons having the Chinese character spelt as Tay, Tey or Teh as the family name or surname shall be included and shall benefit in accordance with the terms of the will.

I also give the consequential reliefs 1 and 2 set out at the beginning of this judgment.

Costs

Reasonable solicitors-clients costs for one counsel to be taxed by the registrar of this court and paid out of the Estate to the plaintiffs' one counsel and the defendants' one counsel for the party or parties who had been legally represented and who had filed their submissions herein.